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Docket Management, Room PL-401
National Highway Traffic Safety Administration (NHTSA)
400 Seventh Street, SW
Washington, DC 20590

Re: Docket No. NHTSA-2001–11107

**Comments Submitted by the Center for Auto Safety ("CAS")**
**on Motor Vehicle Safety: Reimbursement Prior to Recall**
**Notice of Proposed Rulemaking**
**66 Fed. Reg. 64078 (Dec 11, 2001)**

On November 1, 2000, Congress passed the Transportation Recall Enhancement, Accountability and Documentation (TREAD) Act. Pub. L. No. 106-414 which requires: "A manufacturer's remedy program shall include a plan for reimbursing an owner or purchaser who incurred the cost of the remedy within a reasonable time in advance of the manufacturer's notification [of a safety defect or standard non-compliance]." 49 U.S.C. § 30120(d) as amended. The TREAD Act authorized the National Highway Traffic Safety Administration ("NHTSA") to promulgate a rule to implement the reimbursement requirement.

The entire basis for passage of TREAD was that auto makers and suppliers concealed defects to avoid recalls at the cost of untold lives lost and injuries suffered from unsafe vehicles, tires and equipment that went unrecalled. In recognition of and to correct this egregious industry conduct, Congress imposed criminal penalties, increased civil penalties from less than $1 million to $15 million, extended recall periods, and required extensive early warning reporting. In short, Congress wanted to incentivize recalls and disincentivize stonewalls.

NHTSA's proposed rule to implement the reimbursement requirement stands the TREAD Act on its head by creating a new incentive for a manufacturer to stonewall and mislead the agency. By triggering the duty to reimburse on the opening of an Engineering Analysis (EA), the longer a manufacturer can ward off an EA, the lower its liability. In addition to standing TREAD on its head, NHTSA's proposal ignores basic principles of consumer law.

NHTSA's files are replete with examples of how this proposal would let auto makers off the hook when Congress wanted to put them on the hook. The draconian impact of NHTSA's proposal is clearly seen in the pending investigation of failed airbag clock springs in 1996-00 Chrysler minivans. At the time NHTSA upgraded PE00-032 to EA01-007 on February 21, 2001, Chrysler had replaced 450,000 clock springs at an

average cost to consumers of approximately $300.[1] Since no more than 75,000 of these sales were due to crashes where the airbag went off, implementation of NHTSA's proposal could stick consumers with a repair bill of $112,000,000.[2]

Examination of past NHTSA fines for failure to do timely recalls show case after case where EA's were not opened until well after consumers incurred repair costs. For example, on April 25, 1996, Ford announced it would recall 7.9 million 1988-93 vehicles for defective ignition switches. An EA, 95-002, was not opened on this defect until February 23, 1995. Before then the agency had opened at least three PE's (PE92-069, PE94-034, and PE94-078 specifically into ignition switch underdash fires as well as PE89-133 into underdash fires of unknown origin). After State Farm Insurance submitted internal Ford documents to NHTSA that showed Ford had withheld information from the agency, NHTSA compelled Ford to pay a $425,000 fine.

Yet even where a manufacturer withholds information and delays opening of an EA that leads to a recall, under NHTSA's proposed rule, the manufacturer is left off the hook. This is a particularly egregious result in the Ford ignition switch case because all the vehicles recalled were two to seven years old at the time the EA was opened and many had already had ignition switches replaced that are not reimbursable under NHTSA's distorted interpretation of the remedial TREAD Act.

In the case of the thick film ignition (TFI) module mounted on distributors in 1983-95 Ford vehicles, Ford's cover up was so successful that there was never a safety recall even though there were at least five investigations by NHTSA. When NHTSA confirmed Ford's withholding of requested documents during Howard v Ford Motor Co., Cal. Super. Ct. for Alameda Cnty., Case No. 763785-2, it failed to take any action because Ford's coverup had gotten it beyond the then 8-year limit for recall. To add to the incentive of avoiding a recall the additional incentive of avoiding prior recall reimbursement responsibility is headed in the wrong direction.

Another example of how wrong and confusing is NHTSA's proposal can be found in its investigation of fuel rail leaks in 1993-95 Chrysler LH vehicles. In that situation, NHTSA opened EA95-028 on September 22, 1995 and closed it without a recall on February 24, 1997. After realizing that it had been misled by Chrysler, NHTSA opened EA98-007 on March 10, 1998 which led to recall 98V-184 on August 6, 1998. For its misconduct, Chrysler agreed to pay a fine of $400,000 on July 19, 2000. Even NHTSA must concede that there is no bright line here for which EA opening applies, that of EA95-028 in September 1995 which led to no recall or that of EA98-007 in March 1998 which belatedly led to a recall only after Chrysler's cover up was uncovered.

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[1] Although EA01-007 opening resume lists 124,511 as "part sales of clocksprings," this is as of August 2000. Enclosure #6 to Chrysler's May 18, 2001 submission to NHTSA in EA01-007 shows clockspring part sales as 451,704 through February 28, 2001, just 7 days later than the opening date of the investigation.

[2] Although consumers could file lawsuits to recover the repair costs, individual lawsuits are a poor substitute for reimbursement programs as part of recalls and auto makers could introduce NHTSA's regulation into evidence in an effort to avoid liability. Such a result would be a step backward because auto makers today claim they are willing to reimburse owners for recall repairs made prior to the recall. See e.g., Carson v. Chrysler, Civ. No. 304032-2, D Ky.

Given the vagaries of NHTSA's investigatory process which has recently been criticized by the Inspector General for the Department of Transportation, "Review of the Office of Defects Investigation," Report Number MH-2002-071, January 2, 2002, setting any deadline for reimbursement based on the opening of an investigation is inherently arbitrary. The above cases are but a few examples of where basing the right to reimbursement on the opening of an EA would lead to arbitrary results while rewarding industry for delaying recalls contrary to Congress' intention in passing the TREAD Act.

There are two truly bright lines which could be adopted in the current rulemaking – one is derived from consumer law and one is derived from the TREAD Act. If one looks to consumer law, then the bright line is the discovery rule – i.e., the applicable period of time to seek recover is from the date the consumer discovers the defect recall remedy which is the date of the recall notice. The consumer would have the right to seek reimbursement from the date of the recall notice as governed by state law. All NHTSA would have to do is specify that the consumer's right to seek reimbursement and the applicable statute of limitations begins to run on the date of the recall.

However, the better approach is for NHTSA to simply adopt adopt the new limits for the repair for free remedy in the TREAD Act which is 10 years from date of sale for vehicles and equipment and 5 years for tires. This would promote consistency and clarity through the recall process which is essential for consumers to secure their remedies under the Act. The Center agrees with Public Citizen in this recommendation and also in the recommendation that owners of recalled child seats who purchase a new seat prior to receiving the recall notice should receive a refund. Such a measure would create an additional incentive for child seat manufacturers to do prompt recalls as intended by Congress.

Respectfully submitted,

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